

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF PUERTO RICO

3 NATIONAL COUNCIL OF EXAMINERS
4 FOR ENGINEERING AND SURVEYING,

5 Plaintiff

6 v.

Civil No. 07-1479 (SEC)

7 BETHZAYDA CAMERON-ORTIZ,

8 Defendants

9 **DEFAULT JUDGMENT**

10 Upon reviewing Plaintiff's Motion for Entry of Default Judgment (Docket # 16), and
11 supporting Memorandum (Docket # 17), and it appearing from the record that default was
12 entered by the Clerk of this Court upon Defendant 1for failure to answer or otherwise plead in
13 this case (Docket # 13), this Court finds that Plaintiff is entitled to Judgment by Default, and
14 hereby **ORDERS, ADJUDGES, AND DECREES:**

- 15 1. Plaintiff National Council of Examiners for Engineering and Land Surveying
16 ("NCEES") is a nonprofit corporation with its principal place of business in
17 Clemson, South Carolina. NCEES was founded in 1920, and serves state boards
18 in all states, the Commonwealth of Puerto Rico, and the U.S. Territories, which
19 register and license professional engineers and land surveyors. A primary
20 function of NCEES is to prepare standardized, confidential examinations that are
21 used by the state and territorial boards to help determine the competency of
22 individuals seeking to become licensed to practice as professional engineers and
23 land surveyors. Complaint, § 4.
- 24 2. Defendant Bethzaida Cameron-Ortiz ("Cameron-Ortiz" or "Defendant") is a
25 resident of Puerto Rico. Complaint, § 5.

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- 3 3. An individual who intends to provide services as an engineer must possess
4 knowledge, skills, and abilities necessary to provide such services in a competent
5 manner. Working with appropriate subject matter experts, NCEES prepares
6 standardized examinations that test a candidate's knowledge, skills and
7 competence. One such examination is the Principles and Practice of Engineering
8 ("PE") examination. Complaint, § 6.
- 9 4. The PE examination tests academic knowledge and knowledge gained in
10 engineering practice and covers a comprehensive range of subjects in
11 engineering. Distinct PE examinations are administered to specific subject areas.
12 Currently, there are 17 PE exam subjects, one of which is civil engineering ("PE
13 Civil"). Complaint, § 8.
- 14 5. The PE examination is the second of two exams required for a professional
15 license in engineering. A candidate must also pass, or be excused from taking,
16 the Fundamentals of Engineering ("FE") examination, which tests subjects that
17 are taught in a typical, accredited baccalaureate engineering curriculum.
18 Complaint, § 7.
- 19 6. Each PE and FE examination is developed at considerable effort and expense to
20 NCEES, and has significant individual value. Every PE and FE examination
21 question is reviewed and revised many times before being finalized. Complaint,
22 § 9.
- 23 7. The PE Civil Examination is an eight-hour examination, with one four-hour
24 session in the morning and another in the afternoon. All examinees of the PE
25 Civil Examination must take the Breadth Exam during the morning session. The
26 Breadth Exam contains questions from all five areas of civil engineering:

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3 Environmental, Geotechnical, Structural, Transportation, and Water Resources.

4 Each examinee must also select one of five Depth Exams, which are administered
5 during the afternoon session. The Depth Exams focus more closely on a single
6 area of practice in civil engineering. Complaint, § 10.

7 8. The FE examination also is an eight-hour examination, with one four-hour
8 session in the morning and another in the afternoon. Examinees take a general
9 exam during the morning session, consisting of questions common to six
10 engineering disciplines: Chemical, Civil, Electrical, Environmental, Industrial,
11 and Mechanical. During the afternoon session, the examinee must select one of
12 the six discipline-specific exams or another general exam. Complaint, § 12.

13 9. The PE Civil Examination consists of 80 multiple-choice questions, 40 during the
14 morning and 40 during the afternoon session. The FE examination consists of
15 180 multiple-choice questions, 120 during the morning and 60 during the
16 afternoon session. Complaint, § 11 & 13.

17 10. PE and FE examinations include new questions and previously used questions.
18 Some of the previously used questions serve as “equators” to measure the level
19 of performance of candidates from one form of the examination to another. The
20 use of equators ensures that test results on different forms of the examination can
21 be meaningfully compared with one another. Complaint, § 14.

22 11. Because questions and answers from a particular PE and FE exam may be reused
23 on future exams, it is critical that the examination forms be maintained in a secure
24 manner. The questions and answers should not be copied, disclosed or
25 disseminated to any members of the general public -- in whole or in part -- unless
26 NCEES determines to do so. Docket # 17-2, ¶ 13.

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12. PE and FE examinations are original compilations of NCEES and contain original test questions created by or for NCEES. To help protect the confidentiality of its examinations, NCEES registers each examination for copyright protection pursuant to the Register of Copyrights' "secure test" regulations. See 37 C.F.R. § 202.20(c)(2)(vi) (2000). A "secure test" is defined as "a non-marketed test administered under supervision at specified centers on specific dates, all copies of which are accounted for and either destroyed or returned to restricted locked storage following each administration." 37 C.F.R. § 202.20(b)(4). The secure test regulations suspend the requirement to deposit copies of the work, and require instead that registrants of secure tests need only deposit a portion or a description of the test sufficient to identify it. *See* 37 C.F.R. § 202.20(c)(2)(vi). Complaint, § 15.
 13. Each of these test forms, and each of the questions and answers contained on the forms, is an original work of authorship, and the copyright is owned by NCEES. Complaint, § 15 & 17.
 14. NCEES places copyright notices on its examinations. NCEES also places statements prohibiting copying and reproduction on the front of its examination booklets. In addition, NCEES informs prospective examinees, in writing, that they are prohibited from removing test questions or booklets from the examination area. Complaint, § 17.
 15. To further protect the integrity of the examination process as well as NCEES's intellectual property rights, all individuals who take the NCEES examinations are asked to provide their signature below a statement on their answer sheet that, as currently worded, includes the following language:

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3 I further affirm that I will not copy any information onto material
4 to be taken from the exam room. Nor will I reveal in whole or in
part any exam questions, answers, problems or solutions to anyone
5 during or after the exam, whether orally, in writing, on any internet
“chat rooms,” or otherwise.

5 Complaint, § 20; Docket # 17 at 5.

- 6 16. Similar language, prohibiting the copying and/or disclosure of exam information
7 during or after an exam, has been included on NCEES answer sheets for many
8 years. Complaint, § 20.
- 9 17. On October 29, 2005, the FE examination was administered at the University of
10 Puerto-Rico in Mayaguez as part of Puerto Rico’s licensing process for engineers.
11 Cameron-Ortiz took the FE examination on that date, and at that location.
12 Complaint, § 21.
- 13 18. On October 27, 2006, the PE Civil examination was administered at the
14 University of Puerto Rico in Mayaguez as part of Puerto Rico’s licensing process
15 for engineers. Cameron-Ortiz took the PE Civil examination on that date and at
16 that location. She tested in the morning for some period of time and then left the
17 examination room. She returned after the lunch break for the afternoon testing
18 session. Complaint, § 22.
- 19 19. During the afternoon session, an exam proctor observed unusual behavior on the
20 part of Cameron-Ortiz. The proctor informed the Chief Examiner, who also
21 observed Cameron-Ortiz’s behavior. The proctor and Chief Examiner both
22 suspected that Cameron-Ortiz was engaged in inappropriate copying of the exam
23 contents. Complaint, §23.

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- 3 20. When confronted, Cameron-Ortiz denied that she had any illicit copying, or
4 recording devices; however, when she was talking with the Chief Examiner, an
5 electronic device was discovered in her jacket sleeve. Complaint, § 24.
- 6 21. Cameron-Ortiz was taken to a private room, and a search of her jacket and bag
7 was conducted. Various recording and transmitter devices were found, sewn into
8 the pockets of her jacket and her bag, including: (1) a wireless audio/video
9 transmitter module with a built-in microphone, (2) a mini video camera, (3) a
10 receiver, (4) a pocket video recorder, (5) a cradle used to connect to a TV or
11 computer with audio/video input, and (6) two battery packs which could be used
12 to power the equipment in her possession. This equipment allowed Cameron-
13 Ortiz to copy, transmit, duplicate, and otherwise reproduce the contents of the
14 exam material to which she had access. Complaint, § 25 & 26.
- 15 22. Cameron-Ortiz used the above-described equipment, found in her possession, to
16 videotape the PE Civil examination. Complaint, § 27.
- 17 23. Following further investigation, NCEES discovered that Cameron-Ortiz had also
18 videotaped the contents of the FE examination material to which she had access
19 on October 29, 2005. Complaint, § 28.
- 20 24. Cameron-Ortiz was criminally charged, and convicted, as a result of the above-
21 mentioned actions. Complaint, § 29; Docket # 17-3.
- 22 25. Under the Copyright Act, 17 U.S.C. § 101, *et. seq.*, NCEES enjoys exclusive
23 rights with respect to its copyrighted PE Civil, and FE test forms, and the
24 questions and answers therein, including the exclusive rights to copy, reproduce,
25 distribute, display, or create derivative works based on the forms, questions and
26 answers. Complaint, § 31 & 32.

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26. The registration number assigned by the United States Copyright Office to the PE Civil test form infringed by defendant is TX 6-466-566. The registration number assigned by the Copyright Office to the FE test form infringed by defendant is TX 6-295-288. Complaint, § 16.
 27. At no time was Cameron-Ortiz authorized to videotape, copy, reproduce, publish, distribute copies of, disclose to third persons, display or prepare derivative works based on all or any portion of the PE Civil and FE examination forms to which she had access as an examinee. Complaint, § 34.
 28. Cameron-Ortiz has infringed NCEES's copyrights in the PE Civil and FE examination forms, and its copyrights in the questions and answers contained therein. Complaint, § 35.
 29. Cameron-Ortiz clearly engaged in willful copyright infringement. Her actions were knowing and egregious. Complaint, § 36.
 30. The actions discussed above adversely affect the public interest and have the potential for repetition. Complaint, § 37.
 31. Cameron-Ortiz's infringement of NCEES's copyrights has caused NCEES significant financial harm by compromising questions and answers from the examinations administered to her in October 2005, and October 2006. See ETS v. Katzman, 793 F.2d 533, 543 (3d Cir. 1986) (infringement of secure test questions "renders the materials worthless"). Complaint, § 38.
 32. Numerous interests are at stake when an examinee, or prospective examinee, attempts to compromise a secure examination, for his or her own benefit, or to improperly assist other examinees. Those interests include the interests of score users (which, in this instance, are the licensing boards which rely upon NCEES's

3 examinations as part of their licensure process); the interests of the general
4 public, which relies upon the test scores as an assessment of an examinee's
5 competence, knowledge or skills; the interests of the testing entity, which, in
6 addition to protecting its intellectual property, has "the right to protect its own
7 reputation by assuring the reliability of the information it provides;" and the
8 interests of other examinees, who are "entitled to assurance that no examinee
9 enjoys an unfair advantage..." Murray v. Educational Testing Service, 170 F.3d
10 514, 517 (5th Cir. 1999) (citations omitted); see also Nat'l Conf. of Bar Examiners
11 v. Multistate Legal Studies, 458 F. Supp.2d 252, 262 (E.D. Pa. 2006) (finding that
12 "Defendants' willful and egregious copyright infringement harmed the public as
13 well as plaintiffs. States have a compelling interest in regulating admission to the
14 bar both to maintain the integrity of the legal system and to protect the safety of
15 their citizens").

- 16 33. The entry of default judgment is proper in this case because Defendant was
17 properly served with a copy of the summons and complaint, and she failed to
18 answer, or otherwise appear within the statutory time limit. See Graduate
19 Management Admission Council v. Raju, 267 F. Supp. 2d 505, 510 (E.D. Va.
20 2003).
- 21 34. "[A]fter the entry of default, [the Court] must accept as true all well-pleaded
22 factual allegations in the complaint." Hernandez v. Sony, No. CV-01-2187, 2003
23 U.S. Dist. LEXIS 7922, at *3 (D.P.R. Feb. 3, 2003) (citations omitted). The
24 uncontested allegations set out in NCEES's complaint, the additional factual
25 information provided in the Declaration of Robert B. Whorton ("Whorton
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- 3 Decl."), and the other materials filed by NCEES, support entry of judgment
4 against the defendant on both of NCEES's claims.
- 5 35. "In order to prevail in a copyright infringement action, [NCEES] must establish
6 two facts: (1) ownership of a valid copyright and (2) unauthorized copying of the
7 protected work by the alleged infringer." Microsoft Corp. v. PC Express, 183 F.
8 Supp. 2d 448, 452 (D.P.R. 2001) (citations omitted).
- 9 36. NCEES owns the copyright for the PE Civil examination, and FE examination
10 forms relevant to this case, and the questions and answers contained therein. It
11 has been issued copyright registration certificates for each work that has been
12 infringed by Defendant. Complaint, § 16 & 33; Docket # 17 at 9.
- 13 37. A certificate of registration from the Copyright Office constitutes "*prima facie*
14 evidence of the validity of the copyright," and of the facts stated in the certificate.
15 17 U.S.C. § 410(c); see also Gener-Villar v. Adcom Group, Inc., 560 F. Supp. 2d
16 112, 127 (D.P.R. 2008).
- 17 38. Defendant copied NCEES's copyrighted materials. The infringement is
18 indisputable, and default judgment is appropriately entered in NCEES's favor on
19 its claim of copyright infringement. Docket # 17 at 9.
- 20 39. The relationship between Defendant and NCEES was contractual in nature. See,
21 e.g., Johnson v. Educational Testing Service, 754 F.2d 20, 26 (1st Cir. 1985). In
22 exchange for being given the opportunity to take the PE Civil and FE
23 examinations, Cameron-Ortiz paid an examination fee, and agreed to comply with
24 various exam administration policies and rules. Docket # 17 at 10.
- 25 40. When she took the FE examination and the PE Civil examination, Defendant
26 signed a statement on her answer sheets affirming that she had read and agreed

2 to be bound by the terms on the Candidate Information sheet that is provided to
3 all examinees. The Candidate Information sheet prohibited the use of devices
4 with communication or text-editing capabilities in the examination room, and
5 prohibited “fraud, deceit, [and] dishonesty” in connection with taking any
6 NCEES examination. Defendant breached her contract with NCEES by failing
7 to adhere to these prohibitions. Complaint, § 20, 40 & 41; Docket # 17 at 10.

- 8 41. Defendant also affirmed, through her signature on her answer sheets for the FE
9 examination and PE Civil examination, that she would “not remove any exam-
10 related information from the exam room.” Defendant breached her contractual
11 agreement with NCEES by recording information from the FE examination and
12 PE Civil examination and removing, and attempting to remove said information
13 from the exam room. Complaint, § 20; Docket # 17 at 10.
- 14 42. NCEES is entitled to compensatory damages for Cameron-Ortiz’s acts of
15 copyright infringement. “Once liability is found, the factfinder is required to
16 award compensatory damages in an amount appropriate to compensate the
17 plaintiff for his loss.” Soto-Hernandez v. Cartagena, No. 04-1745, 2007 U.S.
18 Dist. LEXIS 81041, at *3 (D.P.R. Oct. 31, 2007) (citation omitted). The court
19 has “considerable discretion” in awarding damages. Hernandez v. Sony, No. CV-
20 01-2187, 2003 U.S. Dist. LEXIS 7922, at *4 (D.P.R. Feb. 3, 2003) (citation
21 omitted).
- 22 43. As expressly permitted under the Copyright Act, 17 U.S.C. § 504(c)(1), NCEES
23 has elected to recover its actual damages, rather than statutory damages. “Actual
24 damages are generally calculated with reference to the loss in the fair market
25 value of the copyright . . .” Data Gen. Corp. v. Grumman Sys. Support Corp.,

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3 36 F.3d 1147, 1170 (1st Cir. 1994) (citations omitted). In a case such as this,
4 involving the infringement of secure standardized test questions, the loss in fair
5 market value is appropriately calculated by determining the development costs
6 for any infringed questions and infringed forms that are retired because of the
7 compromise. See ETS v. Katzman, 793 F.2d 533, 543 (3d Cir. 1986)
8 (infringement of secure test questions “renders the materials worthless.”).

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10 44. Due to Defendant’s actions, NCEES retired one copyrighted exam form, and a
11 portion of another copyrighted exam form. Based upon the cost of replacing the
12 test questions on each of those forms, NCEES has suffered damages in the
13 amount of \$562,046.40 with respect to the compromised PE examination, and
14 \$433,891.20 with respect to the compromised FE examination. Whorton Decl. ¶¶
15 21-22. Cf. Nat'l Conf. of Bar Examiners v. Multistate Legal Studies, 458 F. Supp.
16 2d 252, 262 (E.D. Pa. 2006) (awarding almost \$12 million in damages based upon
17 defendants’ infringing use of approximately 110 questions from the Multistate
18 Bar Examination, plus injunctive relief and attorneys’ fees). Docket # 17 at 12;
19 Docket # 17-2, ¶ 20-22.
- 20 45. NCEES’s actual damages from Defendant’s infringements also include the
21 expenses that NCEES incurred to identify the scope of the infringements, and to
22 address the effects of the infringements with respect to future administration of
23 the exams in question. NCEES incurred such expenses in the amount of
24 \$25,693.25. Docket # 17 at 12; Docket # 17-2, ¶ 23.
- 25 46. This Court **AWARDS** NCEES a total of \$1,021,630.80 in actual damages for
26 Defendant’s infringements of NCEES’s copyrights. Docket # 17 at 12-13.

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- 3 47. NCEES is also entitled to compensatory damages on its breach of contract claim.
- 4 The amount of these damages is the same as the damages suffered by NCEES as
- 5 a result of defendant's copyright infringements. Therefore, the Court awards
- 6 NCEES damages in the amount of \$1,021,630.80 for Defendant's contract
- 7 breaches, but NCEES may recover this amount only once. Docket # 17 at 13.
- 8 48. Defendant's willful copyright violations, involving two separate exam
- 9 administration dates, warrant injunctive relief. See 17 U.S.C. § 502. "The right
- 10 to an injunction attaches where the copyright holder has established past
- 11 infringement and the likelihood of future infringements." Hernandez, 2003 U.S.
- 12 Dist. LEXIS 7922, at *13 (citations omitted); see also Walt Disney, 897 F.2d at
- 13 567 (finding that "[w]hen a copyright plaintiff has established a threat of
- 14 continuing infringement, he is entitled to an injunction.") (citations omitted).
- 15 Docket # 17 at 13.
- 16 49. Pursuant to 17 U.S.C. § 503, this Court **ORDERS** the destruction of all infringing
- 17 copies of materials in Defendant's possession, that include all or any part of any
- 18 copyrighted NCEES test forms, test questions, or test answers. Such relief is
- 19 included in the Court's final Judgment. In addition, Defendant must confirm,
- 20 under penalty of perjury, that she has complied with this destruction requirement.
- 21 See Complaint, § 45; Docket # 17 at 14.
- 22 50. As the prevailing party, NCEES is entitled to recover its costs and reasonable
- 23 attorney's fees pursuant to 17 U.S.C. § 505. "[N]otwithstanding their
- 24 'discretionary' nature, [attorneys' fees] are 'routinely awarded.'" PC Express,
- 25 183 F. Supp. at 455 (citations omitted); see also Pedrosillo Music v. Radio
- 26 Musical, Inc.

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3 of mitigating factors courts routinely grant both costs and attorney's fees in
4 successful infringement actions.”) (citations omitted).

- 5 51. The court “may consider a number of factors in awarding fees to further the
6 underlying purpose of the Copyright Act.” Hernandez, 2003 U.S. Dist. LEXIS
7 7922, at *14. Relevant factors include “the motivation of the parties, the objective
8 unreasonableness of the claims presented and the need to advance considerations
9 of compensation and deterrence.” Id.
- 10 52. All relevant factors justify awarding attorney's fees to NCEES. Defendant
11 undermined the licensing process in Puerto Rico for individuals who wish to
12 perform engineering services, by videotaping NCEES's copyrighted examination
13 materials. NCEES's motivation, in contrast, is to protect its intellectual property
14 rights and the integrity of the licensing process, thereby helping to protect the
15 general public. Since others may be tempted to duplicate Defendant's wrongful
16 conduct, there is a significant need to deter similar conduct by others. Based on
17 the foregoing, the Court awards NCEES its reasonable attorney's fees. This Court
18 **ORDERS** that NCEES file a properly supported petition for attorney's fees, within thirty (30) days of this Order.
- 19

20 **SO ORDERED.**

21 In San Juan, Puerto Rico, this 16th day of June, 2009.

22 S/ *Salvador E. Casellas*
23 SALVADOR E. CASELLAS
24 United States District Judge
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